

Report to Congress on the Status of the International Dolphin Conservation Program

**Prepared by the National Marine Fisheries Service (NOAA Fisheries), on
behalf of the U.S. Department of Commerce**

June 2003



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I. Foreword

The Consolidated Appropriations Resolution, 2003 (Pub. Law 108-7) requires -

“the Department, in consultation with key U.S. stakeholders, to evaluate and document any lack of compliance by the non-U.S. parties to the International Dolphin Conservation Program (IDCP) with its provisions, including through on-site visits and discussions with government officials, observers and others with first-hand knowledge of country practices, and to submit a written report describing the findings to the Committees on Appropriations no later than May 1, 2003. The report is expected to include an evaluation of compliance with the on-board observer program, with a focus on national observers; reporting of dolphin interactions and mortality; international requirements for vessels; and actions by parties to follow-up on infractions identified by the international review panel.”

The National Marine Fisheries Service (NOAA Fisheries), on behalf of the U.S. Department of Commerce, implements the IDCP and other aspects of the U.S. Tuna/Dolphin Program, pursuant to the Marine Mammal Protection Act (MMPA) (16 U.S.C. §1361 et seq.) and the Dolphin Protection Consumer Information Act (DPCIA), as amended by the International Dolphin Conservation Program Act (IDCPA) of 1997. NOAA Fisheries relied primarily on information already in-hand through the processes described above to compile the report (since the 2002 information is not yet available, NOAA Fisheries used 2001 information in this report). To supplement the contents of the report, additional materials on the topics discussed herein are appended to the report and resources for additional information have been referenced.¹

NOAA Fisheries has consulted closely with other nations, the Inter-American Tropical Tuna Commission (IATTC), the U.S. Department of State (DoS), the tuna industry, and appropriate non-government organizations (NGOs) through previous processes to implement the IDCPA and the Agreement on the IDCP. In preparing this report, NOAA Fisheries consulted with DoS, the tuna industry and NGOs through review of the draft report. Their comments have been considered in the development of the final report. In addition, the IATTC Secretariat provided assistance in obtaining information and data included in the report.

II. Background on the Eastern Tropical Pacific Ocean Fishery and the Agreement on the International Dolphin Conservation Program

In the 1950s, fishermen discovered that large, mature yellowfin tuna in the eastern tropical Pacific Ocean (ETP) aggregated beneath schools of certain dolphin stocks. Since that discovery,

¹Further information about the NOAA Fisheries Tuna/Dolphin Program, the associated domestic regulations, lists of nations whose tuna harvested in the Eastern Tropical Pacific Ocean (ETP) is currently embargoed, U.S. participation in the Agreement, the results of the recently completed research required by the amended MMPA, the final finding on the definition of dolphin-safe, ongoing litigation, as well as other related topics, may be found at the NOAA Fisheries Tuna/Dolphin web site at:

http://www.nmfs.noaa.gov/prot_res/PR2/Tuna_Dolphin/tunadolphin.html

the predominant tuna fishing method in the ETP has been to encircle schools of dolphins with a fishing net, or “purse seine,” to capture the tuna concentrated below. Hundreds of thousands of dolphins died in the early years of this fishery. Public concern over high levels of dolphin mortality in the tuna purse seine fishery in the ETP was one of the primary reasons that the MMPA was enacted in 1972. Since then, the MMPA has been amended several times to allow for the continued taking of ETP dolphin stocks under a regime of gradually reducing mortality limits so that the stocks could recover. U.S. participation in the ETP tuna fishery has greatly decreased over the years, coming to a virtual standstill by the early 1980s. Meanwhile, foreign participation in the ETP fishery continues to increase. The IDCP was developed in the early 1990s by the foreign fleets in conjunction with the IATTC, the international organization that manages the tuna fisheries in the region, in order to address concerns about dolphin mortality. The improved fishing techniques and international cooperation under the IDCP, as well as the MMPA amendments, resulted in greatly reduced dolphin mortality in the tuna purse seine fishery in the ETP (Figure 1). Annual dolphin mortality dropped from over 133,000 in 1986 to approximately 2,000 dolphins in 2001, a greater than 99 percent reduction in reported dolphin mortality.²

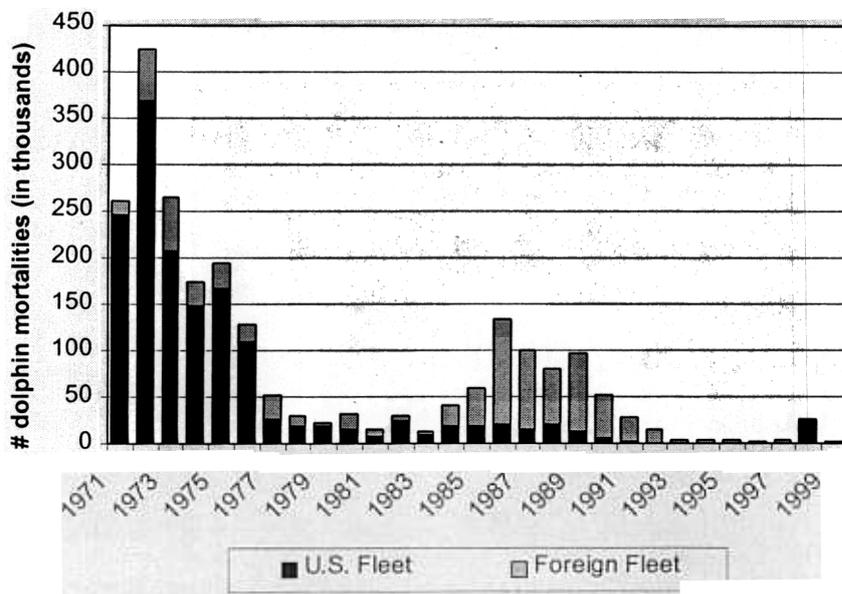


Figure 1: Dolphin Mortality in the ETP 1971-2000

The La Jolla Agreement and the Panama Declaration. In the fall of 1992, nations participating in the ETP tuna fishery signed the La Jolla Agreement, which established the IDCP and placed voluntary limits on the maximum number of dolphins that could be incidentally killed annually in the fishery, lowering the annual limit over seven years, with a goal of eliminating dolphin

² Trends in dolphin mortality for individual dolphin stocks, overall mortality, and mortality per set are provided in the Report on the International Dolphin Conservation Program (Appendix 1).

mortality in the fishery. In 1991, the year before the Agreement was negotiated, dolphin mortalities totaled 27,127. The goal of the La Jolla Agreement was to reduce dolphin mortalities from 19,500 in 1993 to below 5,000 per year by 1999. In 1993, the first year of the program, dolphin mortalities fell to 3,601.

Even with this success, the U.S. market remained closed to tuna caught under the program. In hopes of resolving this issue, the United States, nine other nations fishing in the ETP, and five prominent environmental non-governmental organizations came together in 1995 and negotiated the Panama Declaration. The Panama Declaration established a framework to go even further to protect dolphin populations in the ETP. Under the Panama Declaration, the countries participating in the fishery agreed to negotiate a legally binding agreement that would build on the success of the La Jolla Agreement and strengthen it in several ways. In addition to strengthening efforts to protect dolphins, the signatories to the Panama Declaration committed themselves to reduce bycatch in commercial fisheries and included provisions for additional protection for individual stocks of dolphins and for other living marine resources to achieve an ecosystem approach to management of the fishery. Furthermore, the efforts of the IATTC and the nations that negotiated the Panama Declaration resulted in 100 percent observer coverage of large vessels of the tuna purse seine fishery in the ETP by 1995. This level of observer coverage is unprecedented in any multinational fishery in the world. The nations that signed the Panama Declaration anticipated that the United States would amend the MMPA to allow the import of yellowfin tuna into the United States from nations that are participating in, and are in compliance with, the IDCP. In fact, the commitment of the fishing countries to strengthen the La Jolla Agreement as outlined above was predicated on such changes to U.S. law.

Marine Mammal Protection Act Amendments of 1997 and the Agreement on the International Dolphin Conservation Program. In recognition of the international successes of and in response to the Panama Declaration, Congress passed the IDCPA in 1997, which amended the MMPA to implement the provisions of the Panama Declaration. Specifically, the amendments, 1) allow for lifting the embargoes for countries fishing in compliance with the IDCP; 2) lift the ban on the sale of tuna that is not dolphin-safe under certain conditions; and 3) allow for a change in the definition of dolphin-safe to include tuna caught in accordance with the IDCP, providing that no dolphins were killed or seriously injured in catching the tuna. NOAA Fisheries welcomed the amendments. With the amendments in place and in anticipation of a change in the definition of dolphin-safe, the nations participating in the tuna purse seine fishery in the ETP came together in February 1998 and successfully negotiated the Agreement on the IDCP (the Agreement), a legally-binding international instrument for dolphin conservation and ecosystem management in the ETP. The Agreement built upon previous voluntary dolphin protection commitments that had been adopted by the ETP tuna fishing nations beginning in the early 1990s and was designed to strengthen the dolphin protection measures already in place and afford nations harvesting tuna in the ETP in compliance with those measures access to the U.S. tuna market. To date, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, United States, Vanuatu, and Venezuela have ratified the Agreement. Bolivia, Colombia, and the European Union are applying the Agreement provisionally. The IATTC staff provide Secretariat

support to the Agreement and perform other functions that are set forth in the Agreement or are agreed upon pursuant to the Agreement. The Agreement Area comprises the area of the Pacific Ocean bounded by the coastline of North, Central, and South America and by the 40°N parallel from the coast of North America to its intersection with the 150°W meridian; the 150°W meridian to its intersection with the 40°S parallel; and the 40°S parallel to its intersection with the coast of South America.

The Agreement on the International Dolphin Conservation Program. The Agreement is unique in many ways. There is no other international agreement for which detailed information on every set of every fishing trip is available and used to monitor compliance with agreed to conservation and management measures. The Agreement has a number of features that make it the most closely monitored and most strictly enforced agreement for the conservation of marine resources anywhere in the world, including:

100 percent observer coverage on large vessels (for the purposes of the IDCP, vessels with carrying capacities greater than 400 short tons or 363.8 metric tons, or Class 6); review of data by IATTC Secretariat staff from every set by large vessels; an International Review Panel (IRP) that identifies possible infractions to the provisions of the Agreement, and where the IRP believes that an infraction may have occurred, referral of the incident to the flag state for review and action; and requirement for the flag state to report back to the IRP on the results of its investigation of possible infractions.

The Agreement is widely recognized as the best-monitored, best-enforced, and most transparent agreement for the conservation and management of living marine resources in the world today. Indeed, the Agreement itself requires that the Parties promote transparency in its implementation, including through public participation, as appropriate. Participation in the forum in which the implementation of the Agreement is monitored is not limited to member nations. Industry representatives and non-governmental conservation organizations also attend and actively participate in meetings of the Parties and the IRP and support the overall process. The intergovernmental organizations and non-governmental organizations are also given timely access to relevant information, subject to procedural rules on access to such information that the Parties may adopt. More information on public involvement in the Agreement is described below.

Efforts to Strengthen the Agreement on the International Dolphin Conservation Program. Although the United States has a much smaller presence in this fishery than in the past, NOAA Fisheries' interest in the overall health and well-being of the ETP ecosystem and its living marine resources is stronger than ever. Because the fishery in the ETP is multinational, NOAA Fisheries believes that it is only through multilateral efforts and cooperation that dolphins and the entire marine ecosystem in the ETP will be protected in the long-term. Therefore, NOAA Fisheries fully supports the Agreement and the efforts taken by Parties to eliminate dolphin mortality in the tuna fishery. Even with its successes, NOAA Fisheries believes there is more that can be done to

improve the Agreement and to further strengthen compliance with some of the Agreement's provisions. NOAA Fisheries recognizes that the full implementation of the Agreement is essential to promote the fastest possible recovery of depleted dolphin stocks associated with the fishery.

Over the last year, the United States has expressed the need to continue to enhance the success of the Agreement and, most recently in February 2003, presented a proposal that included a series of measures for strengthening and clarifying existing provisions within the Agreement as well as enhancing key conservation goals envisioned by the Parties (Appendix 2). The proposal was circulated to the Parties for consideration and adoption at the next meeting of the IRP in June 2003. The plan identifies six initiatives that build upon the Agreement to enhance its success: (1) drafting the Terms of Reference for the Science Advisory Board (SAB) provided for in the Agreement; (2) a report by the Secretariat of the IATTC concerning the extent of possible non-compliance by small vessels; (3) a review and evaluation of statistical data differences between the On-Board Observer and national observer programs; (4) a review and evaluation of the level of responses by Parties to alleged infractions and compliance with real-time reporting; (5) an evaluation of the effectiveness of guidelines regarding caps on herd sizes of dolphins on which sets are made; and (6) a tightening of the issuance of tuna tracking forms. The United States is also working with Parties to the Agreement to develop methods to address specific issues and encourages other Parties to do the same.

Since its inception, the United States has strived to improve the IDCP and strengthen the Agreement. The United States was the first country to have a national observer program. The IATTC observer program and some of the other participating countries' observer programs were modeled after the U.S. program. The United States also helps train observers for these observer programs. NOAA Fisheries also administers a dolphin research program that monitors dolphin populations in the ETP, which includes monitoring dolphin abundance and studies of stress-related effects that might be associated with the chase and capture of dolphins associated with tuna. The United States encourages the Parties to the Agreement to support this program and other research to improve gear, equipment, and fishing techniques on tuna fishing associated with dolphins. In addition, the United States successfully encouraged members of the IATTC to adopt a resolution on at-sea-reporting, which reiterates the obligation of captains and crews to provide the on-board observer with the necessary equipment to send weekly reports to the IATTC Secretariat. The weekly reports contain information that is time-sensitive and important for the implementation and management of the Agreement and the setting of annual Dolphin Mortality Limits (DMLs) and per-stock, per-year DMLs.

The United States has taken the lead in fulfilling the requirements of the Agreement for Parties to establish a program to track and verify tuna harvested by vessels in the Agreement Area. At the suggestion of the United States, the Parties established a working group to develop an international tuna tracking and verification system. The United States was instrumental in developing the international system and led the way in encouraging other Parties to develop their national tuna tracking and verification systems. Last year, the United States made a presentation

to the Permanent Working Group on Tuna Tracking which reported on the U.S. tuna tracking and verification program. Since then, three other countries have followed suit and reported to the Working Group on their national programs. In addition, the Working Group, which is permanently chaired by a member of the U.S. delegation, has led the way in developing improvements to the tuna tracking systems that have been adopted by the Parties.

III. The On-Board Observer Program

The IATTC's international observer program and the national observer programs of Ecuador, Mexico, and Venezuela constitute the Agreement's On-Board Observer Program. The On-Board Observer Program began operating in the ETP in 1971, when NOAA Fisheries placed observers on U.S.-registered vessels to record information on dolphin sets and mortality. In 1979, the IATTC instituted a similar observer program on non-U.S. vessels, recording information about dolphin mortality for all large purse seine vessels in the ETP. By 1990, NOAA Fisheries required 100 percent observer coverage of fishing trips involving dolphin sets by U.S. vessels. By 1995, all large purse seine vessels fishing under the authority of Parties to IATTC carried observers.

According to the 2001 Annual Report of the International Review Panel (IRP), purse-seine vessels under the jurisdiction of Parties and non-Parties applying the Agreement provisionally made 766 trips with sets (including sets without dolphins) in the ETP in 2001. These included trips made by Bolivia, Colombia, Ecuador, Spain, Guatemala, Honduras, Mexico, Nicaragua, Panama, El Salvador, the United States, Venezuela, and Vanuatu. The largest number of trips were made by Ecuador, Mexico, and Venezuela with 236, 169, and 145 trips, respectively. Observer coverage was 100 percent for all Parties and non-Parties, except Bolivia and Vanuatu.

In considering sets on dolphins, the 2001 Annual Report of the IATTC indicates that in 2001 there were 9,577 sets on fish associated with dolphins, compared to 9,236 sets in 2001, and 8,648 in 1999. Sets on dolphins have generally remained stable over the past few years, declining for the first half of the 1990s and then increasing in the past years (Figure 2). During this same period dolphin mortalities per set and total mortalities declined significantly from 133,000 as recently as 1986 to a preliminary estimate of less than 2,000 for 2002. Under the provisions of the On-Board Observer Program, Parties

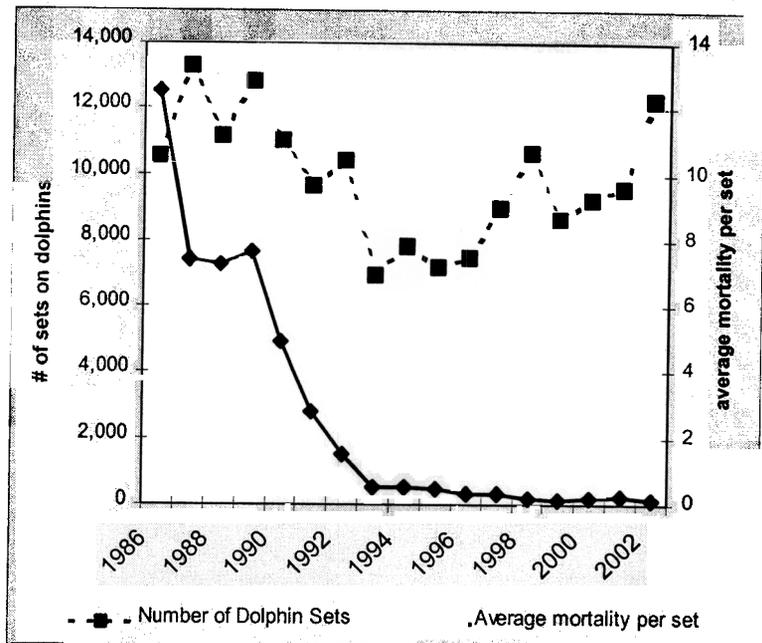


Figure 2: Trends in Number of Sets on Dolphins and Average Mortality per Set

must require their large purse seine vessels (which, for the purposes of the IDCP, are vessels with carrying capacities greater than 400 short tons or 363.8 metric tons, or Class 6) that operate in the Agreement Area to carry an observer during each fishing trip. The Agreement prohibits small purse seine vessels (400 short tons carrying capacity or less) from intentionally setting on dolphins and, therefore, does not categorically require them to carry observers. The Agreement further stipulates that, for Parties with national observer programs, at least 50 percent of the trips taken by vessels under the jurisdiction of any particular Party must be covered by IATTC observers, with the remainder being covered by observers from the Party's national observer program.

To cover the costs of the On-Board Observer Program, the Parties have established annual vessel fees, calculated on the basis of the carrying capacity of each vessel or any other standards specified by the Parties. At the time a Party submits the list of vessels requesting individual vessel DMLs to the IATTC Secretariat, it must also submit payment for the fees established to cover the costs of the observers, specifying which vessels the payment covers. No observer is assigned to a vessel for which the required fees have not been paid and it is a violation of the Agreement for a vessel to fish without an observer.

National Observer Programs. The Agreement outlines the provisions of the On-Board Observer Program and requires all Parties to maintain the program in accordance with those provisions, while also allowing each Party to maintain its own national observer program. National observer programs are subject to the provisions of the On-Board Observer Program. Parties are responsible for ensuring that observers from their national observer programs collect information in the same manner as is required for IATTC observers and to provide to the IATTC Secretariat copies of all raw data collected by observers from their national programs in a timely manner along with summaries and reports comparable to those provided by IATTC observers.

To date, national observer programs have been developed by Mexico, Venezuela, and Ecuador. Mexico initiated its national observer program in 1991. Approximately 50 percent of Mexican vessel trips are now observed through this program, with the remaining trips being covered by IATTC observers per the Agreement. In 2000, Venezuela and Ecuador began using their own national observer programs to cover a portion of their trips, with remaining trips covered by the IATTC. Other nations have also expressed interest in establishing their own national observer programs.

Observer Requirements. All observers, whether from the IATTC's international observer program or a national observer program, must have completed specified technical training required by the Parties, be a national of one of the Parties or a member of the scientific staff of the IATTC, be capable of performing the duties set forth in the Agreement, and be included in a list of observers maintained by the IATTC or, if part of a national observer program, by the Party maintaining the program. The duty of the observer is to gather all pertinent information on the fishing operations of the vessel to which the observer is assigned as is necessary for implementation of the Agreement. Data collected by the observer are used to determine whether

or not a vessel has met or exceeded its DML, a Party has met or exceeded its national DMI and/or the fleet has met or exceeded a per-stock, per-year dolphin mortality cap.

When the IATTC Secretariat determines that the placement of an observer from the On-Board Observer Program is not practical, a vessel subject to the jurisdiction of a Party that fishes in the Agreement Area without setting on dolphins may use a trained observer from another international program to collect pertinent information, provided the other international program is approved by the Parties. Among other duties, the observer on such vessels verifies that the vessel does not set on dolphins. In addition, observers from the On-Board Observer Program may be assigned to vessels of non-Parties at the discretion of the IATTC Secretariat, provided the vessel and the vessel captain comply with all the applicable requirements of the Agreement.

Compliance with the observer requirement is vital to the effective implementation of the Agreement. In instances where the observer requirement has not been met, the IATTC has taken swift steps to notify the Party (or Participating non-Party) of the requirement to carry an observer, and in some cases, has worked with the appropriate nation to place IATTC observers aboard the vessel.³ Furthermore, data collected by observers is essential for monitoring compliance with the provisions of the Agreement and dolphin mortality. In recognition of this and response to a case in which there was a substantial discrepancy between dolphin mortality reported by an observer and a Party, the Parties recently amended an annex to the Agreement⁴ to explicitly state how the observer data shall be used and to provide the process by which Parties may object to the observer data. The process for objecting to observer data requires the Party wishing to object to data to provide reasons for and the evidence to support such an objection to the IRP. The IRP then reviews the evidence and provides a recommendation to the Meeting of the Parties for consideration. The Parties review the evidence and the recommendation of the IRP and make a decision as to the merits of the objection and whether the observer data should be modified.

Differences Between the IATTC's Observer Program and National Observer Programs. NOAA Fisheries believes that the IDCP On-Board Observer Program forms the backbone of the Agreement. The observer programs themselves and the level of observer coverage in this fishery are held up around the world as models for success. As noted earlier, the nature of the Agreement and the detailed data collected by observers for review by the Parties allow for a full and complete assessment and monitoring of the On-Board Observer Program, including the national observer programs.

Preliminary analysis comparing data collected from the observer programs completed by the IATTC Secretariat indicates that some national observer programs may have reporting rates of

³ More information on compliance with the on-board observer requirement, can be found in the IRP Annual Reports at: <http://www.iattc.org/IDCPRelatedDocumentsENG.htm>.

⁴ The annexes to the Agreement have been amended several times since the Agreement went into force in 2000. Amendments to the annexes can be found at <http://www.iattc.org/IDCPRelatedDocumentsENG.htm>

dolphin sets, dolphin mortality per set, alleged infractions, and other data that are different than those reported by IATTC observers. To elucidate any discrepancies, the Parties, with the help of the IATTC Secretariat, reviewed the data resulting from comparisons of the observer programs. In one analysis provided to the IRP in February 2002, the IATTC Secretariat reported that average mortality per set and the reporting rate of infractions by national observers were found to be lower than the rates from IATTC observers for two unnamed programs, though no general conclusion could be drawn from the analysis. In October 2002, the Secretariat provided another set of analyses comparing national observer programs to the IATTC international observer program showing similar differences.

The reason for the differences is unknown. NOAA Fisheries believes that efforts must be made to understand and address this issue as soon as possible. NOAA Fisheries is working with DoS and the Parties to ensure that this issue is given the utmost attention. The IRP agreed to keep this matter as a continuing agenda item to allow a systematic monitoring of the observer programs and to detect and resolve any problems. The United States has requested the IATTC Secretariat to provide analyses comparing the data collected by the observer programs to Parties prior to the next meeting of the IRP in June 2003 for review. If the analyses comparing the data continue to identify discrepancies between the national observer and the IATTC observer programs, the United States will work to secure the full support of the Parties in taking additional measures to address this serious issue. NOAA Fisheries believes that ensuring transparency and consistency among the observer programs is vital to the long-term success of the Agreement and to accurately monitor the status and the rate of recovery of the depleted dolphin stocks.

IV. Reporting of Dolphin Interactions and Mortality

A major component of the IDCP is the assignment of DMLs on a per-vessel basis and the reporting by vessels of dolphin interactions and mortality. DMLs were introduced in the La Jolla Agreement in 1992 and included the establishment of a per-vessel maximum limit consistent with the established overall DML for the international fleet set each year by the Parties. The procedure for establishing the overall DML and assignment of DMLs to Parties to the Agreement for distribution to vessels under their authority is provided in Annex IV of the Agreement and is discussed below. Table 1 summarizes the assignment and utilization of DMLs and the reported dolphin mortality since the Agreement has been in place. As the table illustrates, the Parties use only a portion of the allowable DML and have maintained annual dolphin mortality at approximately 2000 or lower.

Assignment of DMLs. The assignment of DMLs for a given year requires each Party to the Agreement to provide a list of large vessels under its jurisdiction to the Parties, through the IATTC Secretariat, before the first of October of the previous year. At the same time, Parties must also provide a list of other vessels under their jurisdiction that are likely to be operating in the Agreement Area as well as a list of vessels that have requested a second-semester DML for the following year. DMLs may be assigned as full-year DMLs, which cover vessels that will operate in the management area at the start of the year, and second-semester DMLs, which

prohibit vessels from setting on dolphins before the first of July of the year.

	Overall DML	Full-Year DMLs Allocated	Full-Year DMLs Used	Average DML (ADML)	Total Mortality	Average Mortality Per Set	% of Overall DML Used
1998	5,000	98	81	N/A	1,877	0.18	29%
1999	5,000	125	91	N/A	1,436	0.16	29%
2000	5,000	109	89	44.55	1,636	0.17	33%
2001	5,000	82	68	59.75	2,129	0.22	43%
2002	5,000	90	77	53.85	1,477	0.12	30%
2003 ²	5,000	91	N/A	53.85	N/A	N/A	N/A

¹ DMLs for 1998 and 1999 were set under the La Jolla Agreement. The Agreement on the IDCP did not come into effect until 2000.

² 2003 DMLs are preliminary and represent DML requests, not allocations.

In turn, the IRP provides to the Parties a list of qualified applicant vessels eligible to receive a DML the by the first of November. A qualified applicant vessel must have been certified by relevant national authorities to be in possession of all the required dolphin safety gear and equipment, have a captain and crew who received approved training on dolphin release and rescue techniques, be over 400 short tons (363 metric tons) in carrying capacity, have a qualified captain (determined by the IRP), and not be deemed disqualified. Once the list of qualified applicant vessels is provided, Parties are responsible for allocating DMLs to their qualified vessels. A Party cannot allocate to its qualified vessels a greater number of DMLs than what the Party has been allocated (the allocation of DMLs to Parties is described below). Once a Party has distributed DMLs to its qualified vessels, it is required to notify the IATTC Secretariat of the allocation. This notification must be completed no later than the first of February and no vessel under the jurisdiction of that Party may begin fishing for tunas associated with dolphins until the IATTC Secretariat receives this notification. While Parties occasionally fail to adhere to these deadlines, overall compliance is good, and the Parties deal with cases of non-compliance on a case-by-case basis.

Average DMLs and Reserve DML Allocation. The distribution of DMLs to the Parties is determined based on the overall DML, the average DML per vessel, and the reserve DML. Since 2001, the maximum allowable overall DML for the fishery has been set at 5,000 (however, the Agreement allows the Parties to set the overall dolphin mortality limit lower than 5,000, if necessary). This total dolphin mortality cap is consistent with the provisions in the MMPA (16 U.S.C. 1412) as amended by the IDCPA in 1997. The unreserved portion of the overall DML (usually 98%, but it may be adjusted downward by the Parties as necessary) is distributed among the Parties. The remaining portion of the overall DML for the fishery is maintained as the

Reserve DML Allocation (RDA), managed at the discretion of the IATTC Secretariat. The portion of the overall DML distributed to a particular Party is calculated by dividing the unreserved portion of the overall DML for the fishery by the total number of qualified vessels requesting full-year DMLs (to get an average DML per vessel) and then multiplying the average DML by the number of qualified vessels requesting full-year DMLs operating under the jurisdiction of that Party.

Any Party may request that the IATTC Secretariat assign DMLs from the RDA to vessels fishing under its jurisdiction that do not normally fish for tuna in the Agreement Area but that may, from time to time, desire to participate in the fishery in the Agreement Area on a limited basis, provided that such vessels and their captains and crews meet operational and training requirements and other requirements set forth by the Agreement. Any accidental mortalities caused by vessels operating in the Agreement Area under the jurisdiction of any of the Parties that have not requested DMLs for their fleet must also be deducted from this RDA. One example of RDA utilization occurred in 2001, when the IATTC made an RDA to the vessel that participated in the NOAA Fisheries chase-recapture study.

Utilization of DMLs. Any vessel which is: 1) assigned a full-year DML and does not set on dolphins prior to April 1 of that year; or 2) assigned a second-semester DML and does not set on dolphins by October 1 of that year; or 3) assigned a per-trip DML from the RDA and does not set on dolphins during that trip, unless as a result of *force majeure* or extraordinary circumstances, as agreed by the IRP, loses its DML and may not set on dolphins for the remainder of that year.⁵ A request by a Party on behalf of any of its vessels for an exemption due to extraordinary circumstances, is considered to be agreed by the IRP unless a majority of the government members of the IRP supports any objection, made formally and with cause by any other Party, to any such request. All requests for exemption must be sent to the Secretariat by the first of April and any formal objections must be sent to the Secretariat by April 20th. Any vessel that loses its DML on two consecutive occasions is not be eligible to receive a DML for the following year.

Enforcement of DMLs. The enforcement of individual vessel DMLs ensures a substantially high level of accountability from a vessel captain and crew to ensure that a DML is not exceeded. If a vessel meets or exceeds its DML, the vessel must immediately cease all fishing for tuna in association with dolphins for the remainder of the year. If a vessel exceeds its DML during a given year, it is subject to having the amount of such excess, plus an additional 50 percent of that amount, deducted from the DML assigned to that vessel over subsequent years, as prescribed by the IRP. A vessel may receive a DML in excess of the average DML (calculated using the overall DML for the fishery), but only if the vessel's performance in reducing dolphin mortalities is better than the average performance of the international fleet as a whole. A vessel's DML cannot exceed the average DML if, during the previous year, the vessel committed any infraction. If the total mortalities of the fleet of any Party meet or exceed the total amount of DML

⁵The Agreement's guidelines on what constitutes *force majeure*, or extraordinary circumstances, can be found at: <http://www.iattc.org/IDCPRelatedDocumentsENG.htm>

distributed, fishing for tuna in association with dolphins shall cease for all vessels operating under the jurisdiction of that Party for the remainder of that year.

Parties with qualified vessels that will be fishing for tuna in association with dolphins must manage their DMLs in a responsible manner. The Agreement states that a vessel will not be considered qualified at the time it requests a DML if the vessel is operating under the jurisdiction of a Party whose applicable laws and regulations prohibit vessels under its jurisdiction from fishing for tuna in association with dolphins, nor shall DMLs be assigned to any Party in order to provide permits for fishing in the Agreement Area to vessels flying the flag of another State whose applicable laws and regulations prohibit vessels under its jurisdiction from fishing for tuna in association with dolphins. The Agreement also states that no DML shall be assigned to a vessel which has been determined by the Parties to have engaged in a pattern of violations which diminish the effectiveness of the IDCP, as confirmed through enforcement actions taken against such vessel by the Party under whose jurisdiction it operates. The phrase “pattern of infractions” was recently defined by the Parties through the adoption of a resolution developed from language initially proposed by the United States.⁶ The United States believes that this development will greatly enhance the Parties’ ability to better understand compliance by individual vessels within the fleet.

Adjustments of DMLs. Any Party may adjust the DMLs of its qualified vessels that meet the specified criteria either upward or downward for certain vessels, subject to certain limitations. A Party making an adjustment must notify the IATTC Secretariat no later than May 20, and no adjustment takes effect until the IATTC Secretariat has been notified. Furthermore, no vessel may have its initial DML adjusted upward by any Party if the IRP had determined, and the Party with jurisdiction over the vessel concurs, that during that year or the previous two years: 1) the vessel fished without an observer; 2) the vessel set on dolphins without a DML; 3) the vessel set on dolphins after reaching its DML; 4) the vessel knowingly set on a banned dolphin stock; 5) the captain, crew, or the vessel owner committed any actions related to observer intimidation, harassment, bribery, or the like; 6) the vessel made a sanctionable night set; or 7) the vessel used explosives during any phase of a fishing operation involving dolphins.

As indicated earlier, no vessel will be eligible to receive an additional allocation of DML by a Party unless it has onboard all of the required dolphin safety gear and equipment throughout the year; and no such upward allocation may be made for a vessel which has exceeded its initial DML prior to the first of April, unless due to extraordinary circumstances, as agreed by the Parties, in consultation with the IRP. Vessels exceeding their DML, as it may be adjusted, must deduct the amount of the excess plus an additional 50 percent of the excess, unless the IRP recommends otherwise, from their assigned DMLs over subsequent years in a manner prescribed by the IRP. If at any time a vessel meets or exceeds its DML, as it may be adjusted pursuant to the Agreement, that vessel shall immediately cease all fishing for tuna in association with dolphins.

⁶This and other IDCP resolutions can be found at: <http://www.iattc.org/ResolutionsENG.htm>

Stock Mortality Limits. The Parties are required to ensure that in the implementation of the DML system, individual dolphin stock mortality limits (SMLs) are not exceeded. SMLs are global per stock, per year mortality caps which are monitored using data obtained from observers. Annex III establishes a mechanism for calculating SMLs to ensure the most effective means for managing the impact of mortality caused by the fishery on individual dolphin stocks. Under the Agreement, the Parties have established an SML for each stock of dolphins, based on the best available scientific evidence, of between 0.2 and 0.1 percent of the Minimum Estimated Abundance (N_{min}) as calculated by NOAA Fisheries. Beginning in 2001, SMLs were established at 0.1 percent of N_{min} . The Agreement also stipulates the total annual incidental reported dolphin mortality cannot exceed five thousand. It should also be noted that the IDCPA, the U.S. legislation implementing the IDCP, also imposes a dolphin mortality cap of 5,000.

Real-Time Reporting. The Agreement requires the parties to establish a system, based on real-time observer reporting, to ensure effective implementation and compliance with the SMLs.⁷ Real-time reporting of per-stock dolphin mortality is necessary to ensure that SMLs are not exceeded. Currently, the average real-time reporting rate by IATTC and national observer programs is approximately 40 percent. Efforts must be made to improve this low rate of reporting if Parties are to have continued confidence that these SMLs can be monitored and enforced on a near real-term basis. NOAA Fisheries believes that this issue should be addressed as soon as possible and has been working with the DoS and the Parties to develop ways for this to be accomplished.

V. International Requirements for Vessels

Operational Requirements. Annex VIII of the Agreement establishes the operational requirements for large vessels in this fishery, which cover dolphin safety gear and equipment, dolphin protection and release measures, and observer treatment. The Agreement requires that each large purse seine vessel operating in the Agreement Area have a purse seine net equipped with a specifically defined dolphin safety panel; at least three operable speedboats equipped with operable towing bridles or posts and tow lines; an operable raft suitable for the observation and rescue of dolphins; at least two operable face masks suitable for underwater observation; and an operable long-range, high intensity floodlight with a specified minimum output.

Dolphin Rescue Procedures. The Agreement also requires that each large purse seine vessel operating in the Agreement Area perform the “backdown procedure” during every set in which dolphins are captured, until it is no longer possible to remove live dolphins from the net by this procedure. The “backdown procedure” is a process originally developed by U.S. vessels for releasing captured dolphins and has proven very effective at releasing dolphins unharmed. The backdown procedure is performed by shifting the vessel’s engine(s) into reverse during net retrieval, causing the net remaining in the water to form a channel and the corkline at the apex of

⁷ The Procedures for Implementing the SMLs can be found at:
<http://www.iattc.org/IDCPRelatedDocumentsENG.htm>

the channel to submerge. At least one crewman must be deployed during backdown to aid in the release of dolphins, and the vessel crew must continue efforts to release any live dolphins remaining in the net after backdown so that all live dolphins are released prior to the initiation of the “sack-up” procedure (when the catch is concentrated near the surface for loading aboard the vessel). In addition, the vessel must not begin sack-up or brail (the use of a steel ladle-like structure powered by hydraulics to bring the catch in the net aboard the vessel) live dolphins.

The vessel and its crew must also avoid injuring or killing dolphins captured in the course of fishing operations and complete backdown no later than thirty minutes after sunset. Vessel crew are prohibited from using any type of explosive during any phase of a fishing operation involving dolphins. As indicated previously, the vessel must cease setting on dolphins when its DML has been reached, not intentionally set on dolphins if the vessel does not have a DML, and perform a periodic net alignment to ensure the proper location of the dolphin safety panel during the backdown procedure, based on criteria established by the IRP. The Agreement emphasizes that all of these requirements should not lead to crewmen being placed in situations that present unnecessary risks to their personal safety. These extensive dolphin safety procedures have resulted in the lowest levels of dolphin mortality in the history of this fishery.

Treatment of Observers. As indicated before, the Agreement benefits from a program requiring 100% observer coverage, something found nowhere else in the world. The Agreement requires that captains, crew, and other vessel personnel comply with their responsibilities regarding the presence of observers aboard their vessels. The responsibilities of the Parties and vessel captains regarding observers include allowing observers access to vessel personnel and to the gear and equipment onboard that is necessary for completion of their assigned tasks. Upon request, observers must also be allowed access to equipment to carry out their duties, if present on the vessel to which they are assigned, including: satellite navigation equipment; radar display viewing screens when in use; high-powered binoculars including during the chase and encirclement of dolphins to facilitate species identification, except when in use by vessel personnel; and electronic means of communication. Observers must have access to the vessel working deck during net and fish retrieval and to any dolphin specimen, alive or dead, that is brought aboard the vessel during a set in order to collect biological samples or as otherwise required by competent national authorities as part of a national observer program. Vessels are required to provide observers with accommodations, including lodging, food, and adequate sanitary facilities equal to those of the crew. Observers must be provided with adequate space on the bridge or pilothouse for clerical work, as well as space on deck adequate for carrying out observer duties. Finally, the Parties must ensure that captains, crew, and vessel owners do not obstruct, intimidate, interfere with, influence, bribe, or attempt to bribe an observer in the performance of his or her duties. While observer interference is possible in any fishery, cases reported to the IRP have been rare (seven cases were reported in 2001, down from 13 and 12 in 2000 and 2001, respectively).

VI. Actions by Parties to Follow-Up on Possible Infractions Identified by the International Review Panel

The general guidelines for compliance by Parties to the Agreement are provided in Article XVI of the Agreement. It indicates that each Party shall ensure, with respect to vessels under its jurisdiction, effective compliance with the measures adopted in the Agreement. In particular, each Party must ensure, through an annual certification and inspection program, that vessels subject to its jurisdiction comply with the operational requirements established in the Agreement and the observer requirements. It also stipulates a Party's responsibility in cases of violations to the Agreement, stating that each Party must apply sanctions of sufficient gravity as to be effective in securing compliance with the provisions of the Agreement and to deprive offenders of the benefits accruing from their illegal activities, taking into consideration the recommendations of the IRP. Furthermore, for serious offenses, the Agreement states that such sanctions must include refusal, suspension, or withdrawal of the authorization to fish. The Agreement also calls upon the Parties to establish incentives for the captains and crews of vessels, with the view to enhancing compliance with the Agreement and its objectives. The Parties are further required to adopt cooperative measures to ensure compliance with this Agreement, building on decisions that have been taken under the La Jolla Agreement, and must promptly inform the IRP of enforcement actions it has taken pursuant to this Agreement, and the results of the actions.

The International Review Panel. Annex VII of the Agreement establishes the IRP to serve many functions, including compiling a list of the vessels that qualify for DMLs each year; analyzing the reports submitted to the IRP regarding all trips made by vessels covered by the Agreement; identifying possible infractions based on the list of possible infractions approved by the Meeting of the Parties; informing each Party, through the IATTC Secretariat, of possible infractions committed by vessels flying its flag or operating under its jurisdiction and receiving from that Party information on the actions taken; and maintaining an updated report on the actions taken by the Parties to provide adequate training for fishing captains and maintain a list of those fishing captains determined to be complying with established performance requirements, based on the information provided by each of the Parties.⁸

The IRP also recommends to the Meeting of the Parties pertinent measures for achieving the objectives of the Agreement, in particular those related to the use of gear, equipment and fishing techniques, considering improvements in technologies, as well as the adoption of appropriate incentives for captains and crews to meet the objectives of this Agreement. On behalf of the IRP, the IATTC Secretariat prepares and provides to the Parties an annual report (the 2001 Annual Report is attached as Appendix 3) on those aspects of the operation of the fleet relating to the implementation of the Agreement, including a summary of possible infractions identified and the actions taken by the Parties. The IRP recommends to the Parties ways to progressively reduce dolphin mortality incidental to the fishery in the Agreement Area and performs other functions as

⁸IRP meeting minutes and minutes for other meetings associated with the Agreement on the IDCP can be found at the IATTC's web site at: <http://www.iattc.org/MeetingsENG.htm>

assigned by the Parties. The IRP must hold at least three meetings a year, but may convene additional meetings at the request of at least two of the Parties, provided that a majority of the Parties support the request.

The IATTC Secretariat assists the IRP in the convening and organization of its meetings; presents information required by the IRP for carrying out its functions and responsibilities, including observer IRP forms and field data forms providing information on the activities of the vessels, dolphin mortality, and the presence, condition, and use of the dolphin safety equipment and gear; prepares minutes of all meetings and draft special reports and documents dealing with the activities of the IRP. The IATTC Secretariat also provides to each Party, for its consideration, recommendations and information concerning possible infractions identified by the IRP for vessels under its jurisdiction; distributes to the IRP information received from Parties on the actions taken on possible infractions identified by the IRP; and publishes the IRP Annual Report (Appendix 3). In accordance with the instructions given by the Parties, the Secretariat presents to the members of the IRP certain types of information received from the Parties and carries out other tasks necessary for the accomplishment of the IRP's functions. The IRP is unique in its transparency and structure and serves as a model to other multilateral agreements whose parties are considering adopting a similar mechanism for ensuring compliance.

Public Participation in the IDCP and Access to Information. As a part of the overall transparency of the Agreement, the IRP is made up of representatives of the Parties ("governmental members"), three representatives of non-governmental environmental organizations with recognized experience in matters pertaining to this Agreement and with offices in the territory of a Party ("non-governmental members"), and three representatives from the tuna industry operating under the jurisdiction of any of the Parties in the Agreement Area ("non-governmental members"). The non-governmental members are chosen through a specified nomination and election procedure described in the Agreement. In 2001, the IRP consisted of 21 members, 15 from participating governments and six representatives of non-governmental organizations.

While the IRP is a transparent body with respect to the level of information provided to the IRP members, it should be noted that a portion of the information that NOAA Fisheries, DoS, and other members of the IRP receive is considered confidential per the terms of the Rules of Confidentiality developed by the Parties and envisioned in Article XVIII of the Agreement.⁹ The Rules of Confidentiality were established to ensure that the meetings of the IRP consist of open discussion about Parties, vessels, captains, observers, and other details of the fishing operation and compliance with the IDCP, while not divulging commercially sensitive information or information that might place individual members of a vessel crew or observers at risk.

⁹The Agreement on the International Dolphin Conservation Program including the most recent version of the Annexes can be found on the IATTC website at: <http://www.iattc.org/IDCPRelatedDocumentsENG.htm>

The Identification of Possible Infractions. The IRP follows a general procedure for reporting compliance by vessels with measures established by the AIDCP. At the conclusion of a fishing trip, the observer prepares a summary of information pertinent to dolphin mortalities and submits this information to the IATTC Secretariat, who then sends the summary to the government with jurisdiction over the vessel. Upon review of the observer data by the IATTC Secretariat, certain types of possible infractions to provisions of the Agreement are automatically reported to the Party with jurisdiction over the vessel involved in the case. The Secretariat also submits to the IRP for review the observer data for other cases not initially identified as possible infractions. The IRP reviews the information provided at its meetings, and those cases identified by the IRP upon such a review as possible infractions are likewise reported to the relevant Party.

Once the IRP refers a possible infraction by vessels to the Party with jurisdiction over that vessel, the Party has six months to respond the IATTC Secretariat regarding the possible infraction (with the exception of actions related to observer intimidation, harassment, bribery, or the like, in which case the Party has 12 months to respond to the referral). If the Party does not object to the possible infraction identified within the applicable time frame, it is deemed to have provided concurrence of that infraction. A Party is considered to have objected to a possible infraction if it notifies the Secretariat that the possible infraction is being investigated prior to the expiration of the six month or 12 month time frame, as appropriate. In cases of objections, the Party is deemed to have provided its concurrence to the infraction if it does not conclude its investigation and report the final results to the IRP within a period of two years from the date on which the possible infraction was originally referred to the Party, except when it is not possible for the Party in question to complete the investigation within this two-year period, and then the Party must provide an update to the IRP of the status of the investigation and its estimated date of completion. The Party is required to provide a report on the status of the investigation at each subsequent meeting of the IRP until the case is resolved. If a report is not made, that Party will be deemed to have concurred with the possible infraction.

The number of possible infractions identified by the IATTC Secretariat has decreased from 747 in 1999 to 429 in 2001, while the number of dolphin sets has increased from 8,352 in 1999 to 9,676 in 2001. Meanwhile, the IRP has identified certain categories of infractions that should always be submitted for its review. These categories include possible infractions of observer interference, use of explosives and night sets, setting on dolphins without a DML, setting on dolphins after the DML has been reached, and fishing without an observer.

Major and Other Infractions. The IRP has defined violations of the Agreement as being either “major” infractions or “other” infractions. Major infractions include trips without an observer, trips with dolphin sets but with no DML assigned, trips by vessels with DMLs with a fishing captain not on the IDCP List of Qualified Captains (a list maintained by the IATTC Secretariat of captains entitled to fish for tuna associated with dolphins), trips by vessels with DMLs without a dolphin safety panel, intentional dolphin sets made after reaching the DML, sets on banned dolphin stocks or herd types, sets without a required backdown, sets with unavoids dolphin injury or mortality, sets with dolphin sack-up or brail, and sets or chases with use of explosives.

Other infractions include trips without a required raft, trips with less than three speedboats and/or missing towing bridles, trips without a required high-intensity floodlight, trips without required face masks, “night sets” (sets in which backdown is not completed until more than thirty minutes after sunset), sets without required deployment of rescuer, and sets without continued dolphin rescue effort after backdown.

Vessel Compliance with the Provisions of the Agreement. Compliance by vessels with the requirements of the Agreement is generally quite high. The vast majority of trips and sets by fishing vessels under the program, with its unprecedented 100% observer coverage, result in no reported incidents that could be considered possible infractions. The 2001 IRP Annual Report indicates that from a total of 9,679 sets on dolphins, 195 major and 227 other possible infractions were reported to the IRP between June 2001 and February 2002. These data show that major possible infractions were reported from 2.0 percent of the sets and other infractions were reported to have occurred in 2.3 percent of the sets. When taking into account that 101 of 195 major infractions took place on vessels of one Party on approximately three percent of the total trips, the rate of major infractions for vessels of other fleets falls to less than one percent of all sets. Also, as of July 2002, the relevant Parties had responded to the Secretariat regarding 137 (70.2 percent) major and 172 (75.7 percent) other infractions.

While compliance with the Agreement is high for vessels from most fleets, performance and compliance is not equal among all fleets. Of the 195 major possible infractions identified by the IRP in 2001, more than 100 of these occurred on vessels of a single country, Bolivia. Bolivia is not a Party to the Agreement, but is applying to the Agreement provisionally. Bolivia’s vessels undertook only 25 out of a total of 766 trips (3 percent) for the international fleet as a whole. NOAA Fisheries believes that the actions of even one Party can affect the Agreement as a whole and make participation in and defense of the Agreement difficult for all other Parties as they seek to gain access to the United States and other important markets and continue to be under intense scrutiny by the Agreement’s critics. Bolivia does not have an affirmative finding (see below) and yellowfin tuna harvested by purse seine vessels from this nation is currently embargoed from entry into the United States.

The IRP has also been closely following the response by Parties to possible infractions. This topic has been the subject of discussion among members of the IRP for more than a year. Despite the low rate of infractions overall, Parties often do not respond to possible infractions referred to them by the IRP and, in cases where a possible infraction is identified through investigation by the Party to be an infraction, sanctions applied may not be sufficient to deter future infractions by vessels under that Party’s authority. To address these issues, the IRP has included in its 2000 and 2001 Annual Reports information on responses by individual Parties to three specific infractions; namely observer interference, use of explosives, and night sets. For example, 181 possible infractions were referred to all Parties by the IRP in 2001 for possible night sets, use of explosives, and observer interference. In 65 (36 percent) of these cases, no response has been received; 91 (50 percent) were under investigation by the Parties; nine (five percent) had been reported as “No Infraction;” and 15 (eight percent) had resulted in sanctions

being applied, although information on the nature of the sanction was not available. Reporting rates varied from fleet to fleet. A complete breakdown by country is found in Annex V of the 2001 Annual Report of the IRP (Appendix 3).¹⁰

Parties are responsible to impose sanctions of sufficient gravity as to be effective in securing compliance with the provisions of the Agreement and to deprive offenders of the benefits accruing from their illegal activities. During a recent meeting of the IRP, Parties were requested to provide to the IATTC Secretariat information on the domestic legislation that pertain to infractions of the IDCP, including the infractions covered and the level of sanctions associated with each type of infraction. Several of the Parties provided this information and the IATTC Secretariat later reported the results to the Parties. NOAA Fisheries and DoS plan to continue working within the IRP to evaluate the use and level of sanctions by Parties to ensure they are sufficient to promote compliance with the Agreement. The United States is also considering entering into bilateral discussions with Parties where necessary in an effort to improve compliance.

While NOAA Fisheries is encouraged by the very low rate of infractions identified per set and that most had been responded to by the Party involved, we still believe countries should take more stringent action, including the application of appropriate sanctions, in cases where infractions are confirmed. To be true to both the spirit and the letter of the Agreement, NOAA Fisheries believes that the Parties must dedicate themselves to improving the rate and nature of responses to infractions and to increasing their vigilance toward non-cooperating Parties. While the proper investigation of alleged infractions naturally takes time (in the United States, cases diligently investigated can take a year or more), a reading of the 2001 IRP Annual Report illustrates that a number of cases of alleged infractions are mired in investigation or have been dismissed altogether.

NOAA Fisheries, in conjunction with DoS, is working with the nations participating in the Agreement through the IRP and its processes to develop mechanisms for improving compliance with the Agreement by all Parties, especially with respect to major infractions, and is prepared to propose strong actions, amending the Agreement if necessary, to address this. As noted earlier, the United States' proposed plan for enhancing the success of the Agreement that was distributed to the Parties at the last meeting has been resubmitted to IRP and distributed to the Parties for consideration at the June 2003 meeting of the IRP (Appendix 2).

The United States is encouraged that the Parties to the Agreement continue to take steps to improve compliance by vessels with the Agreement. For example, the IRP has adopted several amendments and resolutions that clarify certain provisions of the Agreement. One such development is related to taking steps to further reduce the use of explosives. The use of

¹⁰It should be noted that these data are taken from the 2001 IRP Annual Reports and only reflect responses submitted to the Secretariat by June of 2002, therefore this analysis does not include any responses Parties may have provided since then.

explosives was recently re-categorized as a major infraction, which results in a more severe penalty under the Agreement. This change is reflected in the data contained in the 2001 IRP Annual Report and below. Other topics recently determined by the IRP as needing improvement include the “Development of Procedures for Dealing with Special Problem Sets,” “Determining a Pattern of Infractions,” and “Establishing Technical Guidelines to Prevent High Mortality During Sets on Large Dolphin Herds”.¹¹ In an effort to promote compliance and deter repeated infractions, the Parties recently adopted a resolution titled “Resolution on the Definition of a Pattern of Infractions.”¹² The resolution provides a definition for when a vessel or the captain of a vessel has engaged in a pattern of infractions under Annex IV of the Agreement, which stipulates that a DML cannot be assigned to a vessel which has been determined by the Parties to have engaged in a pattern of violations which diminish the effectiveness of the IDCP. The resolution sets up the process by which vessels are notified that their record of infractions may lead to such a determination.

Special Cases of Infractions involving Small Vessels. When reviewing actions by Parties on possible infractions, the IRP also reviews special cases of possible infractions, including cases involving small vessels. Under the Agreement, small vessels (less than 400 short tons or 364 metric tons or Class 5 or lower) are prohibited from setting on dolphins. For many years, these vessels were not considered powerful enough to regularly chase and set on dolphins. However, recent reports indicate that newer, more powerful small vessels in the Class 4 and Class 5 categories especially are capable of chase and encirclement of dolphins, although this is still prohibited by the Agreement. Because these vessels are not currently subject to observer requirements, monitoring their activity in this regard is difficult. Reports of small vessels setting on dolphins are not recorded directly by observers (unless they have previously been referred to the IRP per a recent decision taken by the IRP as discussed below). However, there is credible evidence suggesting that some unknown number of such vessels may be doing so. Four cases of small vessel infractions remain pending within the IRP.¹³

At least one case of such dolphin sets by a small vessel has been relatively well documented. In May 2002, the *El Dorado*, a small purse seine vessel flagged to Colombia, was seen (and videotaped) setting on and killing at least 25 dolphins in the Galapagos Marine Reserve in waters within Ecuadorian jurisdiction. The Government of Ecuador, a Party to the Agreement, quickly responded to this incident, initiating prosecution of the involved parties through: 1) the Naval Authority in accordance with the Maritime Policy Code; 2) the Galapagos National Park in accordance with the Law for the Conservation of the Province of Galapagos; 3) the Director

¹¹More information about progress made on each of these topics can be found in the minutes of previous IRP meetings at the IATTC’s web site at: <http://www.iattc.org/MeetingsENG.htm>

¹²This and other IDCP resolutions can be found at: <http://www.iattc.org/ResolutionsENG.htm>

¹³ More information on cases involving small vessels can be found in the minutes of the 31st Meeting of the IRP (Appendix 4).

General of Fisheries for violations of the Agreement on the IDCP; and 4) the Penal Judge for Galapagos for environmental crimes described in the Ecuadorian Legal Code. The case is still pending, but possible outcomes may include confiscation of the vessel and its equipment, a maximum of three years in jail for the vessel captain and crew, and a permanent suspension of the vessel's fishing permit. Columbia does not have an affirmative finding and yellowfin tuna from Columbia is currently embargoed from entry into the United States.

The *El Dorado* incident may reflect a larger problem of small vessel compliance with the Agreement. Additional anecdotal information has been raised in informal discussions between U.S. officials and individuals of other nations participating in the fishery. This has included information on a growing number of small vessels belonging to or being built by Parties to the Agreement that are being sized and equipped with the capability to set on dolphins while avoiding the requirements of the Agreement, including the observer, dolphin release, and safety requirements, as well as the U.S. dolphin-safe import regulations and current U.S. dolphin-safe definition (all yellowfin tuna harvested by small vessels that fall outside of the normal bounds of the Agreement is currently considered dolphin-safe). The number of vessels just under the size required to carry observers has increased in the fleets of the Party with the largest capacity of purse seiners operating in this fishery, Mexico, by 3.5 times (from 6 to 21), from 2000 to 2002. Ecuador currently has 18 of these smaller class size vessels (Class 4 and 5). All other Parties have three or less of these class size vessels. Some of these vessels may be capable of setting nets to encircle dolphins. In addition to this, NOAA Fisheries is only aware of minimal anecdotal information regarding small vessel non-compliance. Although some environmental organizations claim to have additional evidence of similar cases, much of this information appears to be inconclusive or speculative. NOAA Fisheries has asked these organizations for specific information or evidence regarding these and other similar cases, but so far no such information has been provided.

While the extent of any such activity is not known, any dolphin mortality by these smaller vessels would not be observed and therefore would be unreported. This undocumented mortality, if occurring at significant levels, could potentially exacerbate the impact that the fishery is having on dolphin stocks. This issue is one that the United States has raised at recent meetings of the IRP, and the U.S. Delegation to those meetings has pushed strongly to encourage the Parties to the Agreement to require observers on small vessels. As a first step, in October 2002, the Parties adopted a proposal to require observers aboard Class 4 and 5 vessels that have been reported to the IRP as having set on dolphins. The United States will continue to push at future meetings of the IRP and the AIDCP for this expanded observer coverage.

VII. Affirmative Findings and Other Dolphin-Safe Requirements

Tuna Tracking and the Dolphin-Safe Label. To implement the dolphin-safe labeling standard, NOAA Fisheries monitors all tuna caught by U.S. flag vessels or canned by U.S. processors, as well as all frozen and processed tuna and tuna products imported into the United States from other nations. This monitoring program depends on a system of written reports, on-site

inspections and audits, and electronic databases to maintain the necessary check and balances to ensure that tuna sold in the United States, when carrying a dolphin-safe label, is truly “dolphin-safe” and was caught in full compliance with internationally agreed conservation measures. In addition, a Fisheries Certificate of Origin known as NOAA Form 370 (attached as Appendix 5) is required to accompany all imports of frozen and/or processed tuna products. The Fisheries Certificate of Origin certifies that tuna products entering the United States as dolphin-safe were harvested in a manner consistent with dolphin-safe standards.

Current U.S. law requires that tuna labeled as dolphin-safe meet certain criteria. There is nothing prohibiting the importation of tuna into the United States that does not meet the dolphin-safe labeling requirements, provided the exporting nation meets certain requirements and has an affirmative finding. This tuna, however, may not be labeled dolphin-safe. U.S. tuna canners have instituted a voluntary dolphin-safe tuna campaign where they purchase only dolphin-safe tuna for introduction to the U.S. market. As noted earlier, the IDCPA provided for an exception to the import prohibition for nations participating in the IDCP, through a change in the definition of dolphin-safe and the dolphin-safe label. However, the change to the dolphin-safe label was contingent upon the results of research into the effects of chase and encirclement on depleted dolphin stocks and the results of a finding required by the Secretary of Commerce on whether the purse-seine industry in the ETP is having a significant adverse impact on dolphin populations.

On December 31, 2002, the Secretary of Commerce, on the basis of that research and other relevant information, made the determination that intentional chase and encirclement of dolphins is not having a significant adverse impact on any depleted dolphin stocks in the ETP. As a result of the finding, the definition of dolphin-safe changed to allow tuna caught by the chase and encirclement of dolphins to be considered dolphin-safe as long as there were no observed dolphin mortalities or serious injury. However, subsequent to that finding, a number of litigants filed a complaint in the United States District Court for the Northern District of California, challenging the final finding and seeking to enjoin any change to the dolphin-safe labeling standard. On April 10, 2003, the Court issued a preliminary injunction, temporarily staying the change in the dolphin-safe definition and returning to the previous definition, which requires dolphin-safe tuna be caught without the chase and encirclement of dolphins in the entire trip and without killing or seriously injuring any dolphins in the set in which the tuna was caught. This preliminary injunction will remain in effect until the court makes a final decision on the merits.

Affirmative Finding Process. NOAA Fisheries is responsible for determining whether nations wishing to export yellowfin tuna and yellowfin tuna products harvested by purse seine in the ETP to the United States are complying with the tuna and dolphin conservation measures of the IATTC and the Agreement on the IDCP, respectively. The process for monitoring and evaluating compliance of nations participating in this fishery and wishing to export to the U.S. market is a substantial one. In order to do this, NOAA Fisheries staff spend a great deal of time discussing issues of compliance with government officials of the Parties to the Agreement, the scientific staff of the IATTC, and others with first-hand knowledge of country practices in implementing the Agreement. If a nation is determined to be meeting its obligations under the IDCP and

IATTC, and meeting the requirements of applicable U.S. regulations, NOAA Fisheries may issue an “affirmative finding” for that nation, allowing the importation of its tuna, whether it be dolphin-safe tuna or not, into the United States. If not, yellowfin tuna imported from these nations is embargoed until they are able to submit evidence of their full compliance and adherence to the IDCP, the IATTC, and the applicable U.S. import requirements.

To receive an affirmative finding, a nation must provide documentary evidence to NOAA Fisheries, including: 1) a statement requesting an affirmative finding; 2) evidence of membership in the IATTC; 3) evidence that a nation is meeting its obligations to the IATTC, including financial obligations; 4) evidence that a nation is complying with the IDCP, including documentation of national laws and regulations implementing the Agreement and evidence that the nation is enforcing those laws and regulations; 5) evidence of a tuna tracking and verification program comparable to U.S. tracking and verification regulations; 6) evidence that the national fleet DMLs were not exceeded in the previous calendar year; 7) evidence that the national fleet per-stock per-year mortality limits, if they are allocated, were not exceeded in the previous calendar year; 8) authorization for the IATTC to release to NOAA Fisheries complete, accurate, and timely information necessary to verify and inspect Tuna Tracking Forms; and 9) authorization for the IATTC to release to NOAA Fisheries information regarding whether a nation is meeting its obligations of membership to the IATTC and whether a nation is meeting its obligations under the IDCP, including managing (not exceeding) its national fleet DMLs or its national fleet per-stock per-year mortality limits.

When seeking an affirmative finding, a harvesting nation must submit an application directly to NOAA Fisheries. If granted an affirmative finding, the government must again formally request an affirmative finding and submit the required documentary evidence every five years thereafter. In addition, NOAA Fisheries reviews the status of the nations and their national programs’ adherence to all of the necessary requirements annually. For the annual reviews, NOAA Fisheries collects information determining the nation’s compliance with the Agreement and standing with the IATTC, based on documentary evidence provided by the harvesting nation, the IATTC, and DoS. NOAA Fisheries may require the submission of additional supporting documentation or verification of information in connection with the request to allow importation of yellowfin tuna. An affirmative finding is valid for a one-year period of time (April 1-March 31) and can be terminated at any time if NOAA Fisheries determines that the requirements for an affirmative finding are no longer being met, or that a nation is consistently failing to take proper enforcement actions on violations which diminish the effectiveness of the IDCP.

Under the Agreement, all Parties are required to apply their national laws and regulations, while taking into consideration the recommendations of the IRP to maintain and enforce the provisions of the IDCP. Violations of national laws and regulations are dealt with by the national authorities. When considering a nation’s compliance with the Agreement for an affirmative finding, the United States monitors violations including the severity and frequency of the violations as well as the response by the nation to the violation, through information from the IATTC, meetings of the IRP, and from the nation itself. NOAA Fisheries takes into

consideration the ability of the nation seeking the affirmative finding to monitor and enforce its laws and regulations to uphold the Agreement before issuing an affirmative finding.

Whether or not a nation has submitted an application for an affirmative finding, if it is harvesting yellowfin tuna in the ETP with large purse seine vessels and has not received an affirmative finding, its tuna must be embargoed. For example, in 2000, the United States embargoed tuna from Belize, Bolivia, Colombia, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Vanuatu, and Venezuela even though, at the time, none of these nations had applied for an affirmative finding. Similarly, in 2002, the United States embargoed tuna from Peru because, for the first time, a Peruvian vessel was harvesting yellowfin tuna in the ETP with a large purse seine vessel and had not received an affirmative finding. NOAA Fisheries is working with nations that have not received affirmative findings to assist them with the process of understanding and addressing all of the necessary obligations for obtaining an affirmative finding.

Meeting affirmative finding requirements illustrates not only a nation's compliance with the Agreement, but also with IATTC tuna conservation provisions and U.S. import requirements. To adequately analyze all of the information submitted by the applying nation, NOAA Fisheries works with applicant countries, the IATTC, and the DoS to obtain the necessary information to expedite analysis and the processing of applications. NOAA Fisheries also works with the U.S. Customs Service to ensure that only nations that have received affirmative findings are allowed to import yellowfin tuna from the ETP into the United States.

NOAA Fisheries' affirmative finding process has been heavily scrutinized. In fact, Mexico's 2000 affirmative finding was the subject of litigation in the U.S. Court of International Trade (CIT). In this case, NOAA Fisheries' analysis of Mexico's adherence to the IDCP and the IATTC conservation regime and the affirmative finding program strongly prevailed. NOAA Fisheries' affirmative finding process evaluates the compliance of nations wishing to import into the United States yellowfin tuna harvested by purse seine in the ETP and holds those nations to strict criteria for compliance.

As indicated earlier, affirmative findings must be reviewed annually. In the cases of Ecuador and Mexico, renewals were granted in 2001 and 2002, respectively. NOAA Fisheries personnel are currently in the process of obtaining the necessary information for both Ecuador's and Mexico's 2003 affirmative finding renewals. NOAA Fisheries is also working with Peru and El Salvador to assist them in completing their affirmative finding applications.

To date, NOAA Fisheries has received affirmative finding applications from Ecuador, El Salvador, Mexico, Nicaragua, Panama, Peru, Spain, and Venezuela. In 2000, NOAA Fisheries issued affirmative findings for two nations, Ecuador and Mexico, allowing them to import tuna harvested by purse seine in the ETP into the United States. In 2000, NOAA Fisheries reviewed documentation submitted by the Governments of Spain and Nicaragua and determined that they had not yet met the requirements for an affirmative finding. In 2001-2002, NOAA Fisheries found the same was true for Governments of El Salvador, Panama, and Venezuela and denied these nations affirmative findings.

VIII. Conclusions

The Agreement is a strong and complex agreement. It is the most sophisticated international bycatch management regime in the world. In following through with the earlier success of the IDCP established by the La Jolla Agreement, it has succeeded in maintaining dolphin mortalities at a minimal level, even while fishing effort has remained at high levels. This has been accomplished by reducing the dolphin mortality per-set through the procedures and safeguards required under the program. Even with the continuing success of the AIDCP, the United States continues to seek ways to improve and strengthen the program and the Agreement to ensure the highest possible level of protection for dolphins during the course of tuna fishing operations. Indeed, the IDCP has greatly reduced the levels of dolphin mortality and raised awareness for broader ecosystem management in the ETP and the other oceans of the world.

Even though the U.S. tuna fishery has had a much smaller presence in the ETP in recent years, NOAA Fisheries still remains actively involved in the management of the tuna purse seine fishery and the conservation of the living marine resources of the ETP. Through the implementation of the dolphin-safe label for tuna sold in the United States, the affirmative finding process, participation in meetings of the IDCP, as well as through continued monitoring of the dolphin stocks, NOAA Fisheries has demonstrated a deep interest in the success of the Agreement.

As noted earlier, compliance by vessels with the conservation provisions of the IDCP is generally quite high. NOAA Fisheries, however, believes that there is a need for continued vigilance among the nations participating in the IDCP and that further progress in protecting dolphin populations will require a continued high level of compliance with the conservation measures of the Agreement. One of the strengths of the Agreement is that the Parties have continued to identify areas where changes would strengthen the Agreement and, when identified, quickly moved to adopt those changes. The United States has expressed an interest over the last year or more in continuing such efforts, especially with respect to reviewing consistency of the IATTC international observer program and the national observer programs, the setting on dolphins by small vessels, and adequate follow-up to possible infractions reported to the Parties. NOAA Fisheries is working with its close partners, including DoS and key stakeholders, to present to the Parties ideas for resolving these issues, some of which have come to light as a result of our recently completed research and IATTC analyses, among other sources. At the meetings in February 2003, the U.S. delegation presented a proposed resolution to the other Parties as a way of demonstrating the importance of continued improvement of the IDCP to the United States. NOAA Fisheries anticipates the Parties will approve this resolution at the next meeting of the IRP in June 2003.

NOAA Fisheries is anxious to move forward on these matters and believes that the majority of Parties to the Agreement share a common interest in working to ensure the strongest possible agreement. Although much has already been accomplished by the IDCP to reduce dolphin mortalities in the ETP, NOAA Fisheries recognizes that more needs to be done. NOAA Fisheries is also aware that change is slow in international fora, but is fully committed to continuing to

work within the framework of the IDCP to achieve even greater success at long-term dolphin conservation and recovery, ecosystem management, tuna resource management and fisheries activities in the ETP.